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Immigration Update - What Employers Need to Know Now

Active Enforcement of Employer Sanctions Returns

By Nancy-Jo Merritt

The recent nationally coordinated Immigration and Customs Enforcement (ICE) "raids" on 40 IFCO Systems locations, leading to the arrest of more than 1000 unauthorized workers and the arrest and criminal prosecution of nine company managers, is a clear indication of a change of strategy and renewed focus on worksite enforcement by the government.

Julie Meyers, the new ICE Director, told CNN, "We are turning away from focusing only on civil liability. We are now focusing on criminal cases and bringing as many criminal charges as we can when we find employers that blatantly violate worksite enforcement laws."

As a reminder, there are civil and criminal penalties currently in place for violation of the rules governing hiring of foreign national workers. Civil penalties include fines ranging from \$250 to \$10,000 per worker for the knowing hire or continuing employment of unauthorized workers, in addition to cease and desist orders. Criminal prosecution and injunctions can be imposed on individuals or companies who engage in a "pattern or practice" of violations, including fines up to \$3000 or six months imprisonment, or both. Frequently, charges include money laundering, and harboring or transporting alien workers, along with allegations of accepting or receiving fraudulent documents in order to employ unauthorized workers. Charges can be brought against the company in addition to managers and supervisors whom ICE believes have knowingly engaged in proscribed activities.

Expect ICE to be looking closely at companies that it suspects may have unauthorized elements in its workforce, especially companies that have received "no match" letters from the Social Security Administration (SSA). If your company has not done an internal audit of your I-9s recently, we suggest that you consider taking that step, especially if SSA has previously sent "no match" notices. We are available to provide assistance or general advice and checklists for such a project. We also suggest that this is the time for companies to review their procedures for response to service of search or arrest warrants. Remember that although employers must be given three days notice for inspection of I-9s, notice is not required for service of a federal search warrant related to a criminal investigation.

Immigration Reform: What to Expect from New Employment Verification Rules

During the national debate on comprehensive immigration reform, worksite enforcement has become a key topic. While there will no doubt be changes in the pending legislation, employers can expect a system of employment authorization verification via an electronic system connected to SSA or Department of Homeland Security (DHS) or both. For that reason, it is instructive to look closely at Title III

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("Unlawful Employment of Aliens") of S2611/2612, the primary Senate immigration reform bill. This section is meant to be the "fix" of the current I-9 employment verification system. In addition to the I-9 (or a similar form), the bill would require employers to use an Electronic Employment Verification System, EEVS, referred to in the bill as "the System."

Like the current I-9 system, it will be unlawful for employers to knowingly (or in reckless disregard) hire an "unauthorized" individual, or to hire any individual, unless the employer has verified the individual's identity and employment eligibility by examining appropriate individual documents and participating in the System. The bill would require employers to copy all verification documents, and keep verification paperwork for seven years after the date of hire or one year after the employee is terminated, whichever is later. In addition, employers will be required to copy and retain all verification documents, a change from the current process.

The System is to be implemented and developed by DHS in cooperation with SSA, according to specific requirements for response times and accuracy. Employers must participate in the System with the start date dependent upon whether they are a "critical employer" or a "remaining employer." "Critical employers" will be those designated by DHS in its "sole and unreviewable" discretion based on critical infrastructure, national security, or homeland security needs. Employers designated as "critical" will be required to participate in the System with respect to both current and future employees. "Remaining employers," will be required to participate in the System within eighteen months after funds have been appropriated to implement the requirement. Nonetheless, the Secretary may require participation at any time if there is reasonable cause to believe that the employer has engaged in violations of the statute.

The System will protect participating employers from liability "under any law for any employment-related action" taken in good faith reliance on information provided by the System.

The bill would give DHS authority to investigate and enforce compliance as follows:

- Civil penalties for hiring or continuing to employ unauthorized aliens:

First-time violators: \$500 to \$4,000 for each unauthorized alien, and \$4,000 to \$10,000 for subsequent violations.

Employers fined more than once or who failed to comply with a previous order: \$6,000 to \$20,000 for each unauthorized alien.

- Record keeping or verification penalties:

First-time violators: \$200 to \$2,000.

Repeat violators: \$400 to \$4,000; \$6,000 if there has been failure to comply with an earlier order.

- Other penalties:

DHS may also impose cease-and-desist orders, individual compliance plans, suspended fines, and penalties for unlawful employee indemnity bonds.

- Criminal penalties and injunctions:

Employers who engage in a "pattern or practice" of knowing violations "shall" be fined up to \$20,000 for each unauthorized alien and imprisoned for not more than six months, along with imposition of a permanent or temporary injunction or restraining order.

A fraudulent attestation by an employee that he or she is "authorized" will subject the individual to a fine of not

more than \$5,000 and/or a term of imprisonment of at least three years.

The bill also contains provisions to debar employers from receipt of government contracts, grants, and agreements for a period of two years, although operation of this section may be waived if the government finds it appropriate.

Although in the past the INS (and then the DHS) did not interact or exchange information with SSA or the Internal Revenue Service, the proposed bill specifically amends the Social Security Act and the Internal Revenue Code to require the exchange of information in certain instances. For example, the Commissioner of Social Security would be required to directly disclose to DHS the taxpayer identity information of employers who have received no-match notices during calendar years 2005, 2006, or 2007.

Of course, any final immigration reform legislation cannot be predicted in detail, and may vary wildly from the current version. Nonetheless, the perception that worksite enforcement must be strengthened is an area of wide bipartisan agreement, and employers can expect an employment verification system very much like the version described above.

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